IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 28TH JUNE 2007 / 7TH ASHADHA 1929

SA.No. 131 of 1994()

AS.47/1989 of DISTRICT COURT, KOTTAYAM
OS.76/1986 of MUNSIFF COURT, PALAI
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APPELLANTS:RESPONDENTS:PLAINTIFFS:
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1. **JOSEPH JOHN, MALIACKAL POOVARANYKARA, MEENACHIL VILLAGE, KOTTAYAM.**

2. **JOSEPH JACOB, ...DO...DO.....**

BY ADV. SRI.MATHEW JOHN

RESPONDENTS: APPELLANTS:DEFENDANTS:
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1. **STATE OF KERALA, REPRESENTED BY THE DISTRICT COLLECTOR, KOTTAYAM.**

2. **THE MEENACHIL TAHSILDAR, PALAI.**

BY GOVERNMENT PLEADER SMT. LATHA THANKAPPAN for R1&R2

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 28/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.194/1994 IN S.A.NO.131/1994

DISMISSED

28/06/2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

Kss

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 131 OF 1994

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DATED THIS THE 28th DAY OF JUNE, 2007

JUDGMENT

Plaintiffs in O.S.76 of 1986 on the file of Munsiff Court, Pala are the appellants. Defendants are the respondents. Appellants instituted the suit seeking a decree for permanent prohibitory injunction restraining respondents from proceeding against the plaint schedule property as per the provisions of Revenue Recovery Act contending that the plaint schedule property originally belonged to the father and it was purchased by Kunjan Chettiar in court auction sale and he took delivery of the property and later filed O.S.32 of 1975 for a mandatory injunction directing mutation of registry in his name and O.S.103 of 1975 against respondents from proceeding against the property under Revenue Recovery Act and O.S.32 of 1975 was decreed. Appellants purchased the property under Ext.A1 sale deed dated 5.2.1981. Appellants would

contend that though O.S.103 of 1985 was dismissed for want of a notice under Section 80 of Code of Civil Procedure, the findings therein that the court auction sale in favour of Kunjan chettiar is valid and for the amount due from Thomas Joseph respondents cannot proceed against the plaint schedule property and therefore appellants are entitled to a decree for perpectual injunction. Respondents resisted the suit contending that Rs.27,599.94 was due from Thomas Joseph father of appellants as Abkari arrears and revenue recovery proceedings were initiated for recovery of the same on 11.9.1969 and then defaulter filed O.P before the High Court and got the sale adjourned and the court auction sale and the assignment deed in favour of appellants were created to shield the property and O.S.216 of 1973 was a collusive suit and Government was not a party to that suit and plaint schedule property is the first charge for the Abkari dues and therefore appellants are not entitled to the decree sought for.

2. The trial court granted a decree in favour of the appellants holding that though the earlier suit was dismissed, the findings in the said suit against the respondents are binding on them and Kunjan Chettiar had title to the property under court auction sale and as assignees from him, appellants have title to the property and respondents are not entitled to proceed against the property belonging to the appellants.

3. Defendants challenged the decree and judgment before District Court, Kottayam in A.S.47 of 1989. Learned District Judge on reappreciation of evidence held that even though there are adverse findings in Ext.A2 judgment in O.S.103 of 1975 against defendants, the suit was dismissed and hence the findings therein against defendants will not operate as resjudicata and as State has first charge over the plaint schedule property for the arrears of abkari dues appellants are not entitled to the decree and set aside the findings of the learned Munsiff and dismissed the suit. It is

challenged in the second appeal.

4. The second appeal was admitted formulating the following substantial questions of law.

i)Is not the finding of first appellate court that Ext.A2 judgment will not operate as resjudicata wrong in view of the Full Bench decision of this court in **Khalid V. Sulekha and others** (1987(1) ILR Kerala 111).

ii)Is not the first appellate court in serious error in not holding that respondents are barred by principles of resjudicata from taking up the present contentions in view of the findings in Ext.A2 judgment.

Iii)Is the first appellate court in serious error in holding that respondents have a charge over the plaint schedule property and the same could be enforced without even seeking to set aside Ext.A1 sale deed and also the court sale in execution of the decree in O.S.216 of 1973.

5. Learned counsel appearing for the appellant and the learned Government Pleader were heard.

6. Learned counsel appearing for appellants relying on the decision of High Court of Andhra Pradesh in **Mahadeva v. Sreeramamurty (AIR 1955 A.P.282)** argued that even when half cost was allowed to the defendants while dismissing the suit and defendants did not file an appeal, it was held that the judgment would operate as resjudicata as against the defendants and so Ext.A2 judgment would operate as resjudicata and the finding of the first appellate court is not sustainable. Relying on the decision of the Full Bench in **Khalid v. Sulekha (ILR 1987(1) Kerala 111** it was argued that even if the suit is dismissed, the judgment would operate as resjudicata.

7. In **Mahadeva's case (supra)** a single Judge of High Court of Andhra Pradesh was considering the question whether the finding in an earlier suit which was dismissed, would operate as resjudicata. In that case, it was held that the adverse

finding against defendant in the earlier judgment would operate as resjudicata, in a subsequent suit between the same parties, as the basis for awarding half of the cost in the suit was a finding on the plea raised and no appeal was filed against that finding. The facts of that case show that in the earlier judgment it was found that defendant was entitled to equal right in the suit property and it was the basis for disallowing half the costs to the defendant. The dispute between the parties in that suit was whether defendant has only half right in the property or absolute right. It was therefore held that the defendant could have preferred an appeal against that part of the decree and as it was not appealed against, that finding operates as resjudicata in the subsequent suit, where substantially the same question arose.

8. The Full Bench of this court in Khalid's case was considering the question whether Ext.B20 judgment therein would operate as resjudicata. That suit was instituted by the plaintiff as power

of attorney holder of the karanavan for and on behalf of the tarwad. Relying on the decision of the Apex Court in **Vithal Yeshwant Fathar v. Shikandar Khan Kakhtum Khan Sardesai (AIR 1963 S.C.385) and Gangappa Gurupadappa Gugwad v. Rachawwa and others (A.I.R. 1971 S.C.442)** this court held that that suit is barred by resjudicata on account of Ext.B20 judgment as the decision on each of the points operate as resjudicata between the parties. It was held that if the court decides the various issues raised on the pleadings, it is difficult to see why adjudication of rights of the parties apart from the question as to applicability of section 80 of the Code of Civil Procedure and absence of notice thereunder should not operate as resjudicata in a subsequent suit where identical question arise for determination between the same parties. In that case this court did not consider and did not lay down a principle that when a suit is dismissed any finding against the

defendant in that suit, would operate as resjudicata against that defendant in a subsequent suit.

9. When the suit is dismissed under Ext.A2 judgment defendants are not to file an appeal challenging the decree and judgment. Eventhough there are findings against the defendants in the suit, it cannot be said that defendants are aggrieved by the dismissal of the suit so as to file an appeal against the decree and judgment dismissing the suit. The question is settled by the Apex Court in Ganga Bai v. Vijay Kumar (AIR 1974 SC 1126). Apex Court held:-

> "Under Section 96(1) of the Code of Civil Procedure, save where otherwise expressly provided by the Code or by any other law for the time being in force, an appeal lies from every decree passed by any court exercising

original jurisdiction, to the court authorised to hear appeals from the decisions of such court. Section 100 provides for a second appeal to the High Court from an appellate decree passed by a court subordinate to the High Court. Section 104(1) provides for appeals against orders of the kind therein mentioned and ordains that save as otherwise expressly provided by the Code or by any law for the time being in force an appeal shall lie "from no other orders". Clause (i) of this section provides for an appeal against "any orders made under Rules from which an

appeal is expressly allowed by rules". Order 43, Rule 1 of the Code, which by reason of clause(i) of Section 104 (1) forms a part of that section, provides for appeals against orders passed under various rules referred to in clauses (a) to (w) thereof. Finally, Section 105(1) of the Code lays down that save as otherwise expressly provided, no appeal shall lie from any order made by a Court in exercise of its original or appellate jurisdiction.

These provisions show that under the Code of Civil Procedure, an appeal lies only as against a decree or

> as against an order passed under rules from which an appeal is expressly allowed by Order 43, Rule 1. No appeal can lie against a mere finding for the simple reason that the Code does not provide for any such appeal. It must follow that First Appeal No.72 of 1959 filed by defendants 2 and 3 was not maintainable as it was directed against a mere finding recorded by the trial court."

10. As the suit was dismissed under Ext.A2 judgment, the findings against the defendants who are respondents herein will not operate as resjudicata. Appellants are therefore not entitled to get a decree on the basis of the findings against the defendants in Ext.A2 judgment.

11. As rightly found by first appellate court in view of the provisions of Section 28 read with section 68 and 2(j) of Abkari Act and Section 3 of Revenue Recovery Act, 1969 government has first charge on the plaint schedule property for the abkari dues. State is therefore entitled to proceed against the plaint schedule property for realisation of the amount due from the defaulter Thomas Joseph, who is none other than the father of the appellants. The substantial questions of law are therefore answered as follows:- Ext.A2 judgment will not operate as resjudicata against respondents as the suit was dismissed and respondents were the defendants in the suit. State can recover the arrears of Abkari dues due from Thomas Joseph, by proceeding against the plaint schedule property under the provisions of Revenue recovery Act. As the court auction sale or the assignment by the auction purchaser in favour of the children of Thomas Joseph are not binding on the State, to recover the abkari dues, there is no necessity to

set aside Ext.A1 sale or the court auction sale.

There is no merit in the appeal and it is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

lgk/tpl/-

M.SASIDHARAN NAMBIAR, J.

SA NO. 131/1994

JUDGMENT

28TH JUNE, 2007